THIRD SESSION

Friday, April 25, 1913, 2:30 o'clock p.m.

The meeting was called to order at 2:30 o'clock p.m., with Secretary Scott in the chair.

The CHAIRMAN. Ladies and gentlemen: We were unfortunately unable to finish the discussion of the question "Does the expression 'all nations' in Article 3 of the Hay-Pauncefote Treaty include the United States?" At the conclusion of the next paper dealing with this matter, the question will be open for discussion, and I know I express the desire of the Society at large that there should be an exchange of views, because there could be no doubt whatever that where the views presented have been so inconsistent, there must be some members present who are impressed by this inconsistency and who can perhaps contribute to the elucidation of the matter.

It gives me very great pleasure to present to you a gentleman who is Professor of International Law in the Law School of Harvard University, and who will give us the result of his consideration of this all important topic—Professor Eugene Wambaugh, of the Harvard Law School.

DOES THE EXPRESSION "ALL NATIONS" IN ARTICLE 3 OF THE HAY-PAUNCEFOTE TREATY INCLUDE THE UNITED STATES?

ADDRESS OF MR. EUGENE WAMBAUGH, *Professor in the Harvard Law School.*

The Hay-Pauncefote Treaty is short. As usually printed, it covers only two pages. It contains fewer than nine hundred words, and more than three hundred of these are words of ceremony found at the beginning and the end of most treaties, these being instruments in which the form ranks almost as high as the substance. Thus it happens that in this short treaty only two-thirds, or almost exactly six hundred words, can be considered as indicating the rights and the duties which it creates or recognizes. In fact, the Hay-Pauncefote Treaty, though it bears to the Panama Canal a relation resembling that which is borne

to England by Magna Charta and that which is borne to the United States by the Constitution, is only from one-third to one-fourth as long as the treaty of 1903 with Panama and only about one-eighth as long as the Panama Canal Act of 1912. Hence, even without reading the Hay-Pauncefote Treaty one would be inclined to suspect that here is an instrument not always capable of indicating by its mere words the rights which it was meant to establish and to clarify.

This impression will be confirmed by reading the treaty. May the United States fortify the canal? Will the treaty continue to give rights to Great Britain in case that country shall be at war with the United States? In case of war between Great Britain and the United States, will the rights of other nations be in any way affected? In case of war between the United States and some country other than Great Britain, may that other country continue to use the canal for its merchant vessels, its transports, and its battleships? These are only a few of the problems not expressly and fully solved, but arising necessarily and obviously. There are other questions less practical and more theoretical. Thus, as the treaty is merely between the United States and Great Britain, can it be said that other countries really have any rights at all under it, and, if so, are those rights to be enforced only through Great Britain; and do other countries have any duties, for example, the duty to refrain from blockading the canal, and, if so, do any countries other than the United States and Great Britain have a right to complain of the infringement of those duties? These are questions on which the treaty certainly leaves room for discussion. Further, the words of the treaty, even as to matters rather minutely covered, sometimes suggest difficult questions of which it must suffice to give only one, namely, whether, under the clause prohibiting warships of a belligerent to sail from either terminus within twenty-four hours after a warship of another belligerent has sailed therefrom, it will be possible for one warship of a belligerent, by going to and fro through the canal like a shuttle, turning on the course a marine league outside each terminus, to detain permanently at one terminus or the other the whole fleet of the other belligerent.

The mentioning of such questions as these is not meant to carry an intimation that the treaty is framed carelessly. No, the lesson is simply that as to such an intricate collection of topics a treaty of six hundred words, however carefully framed, cannot cover the whole ground.

Yet these questions, and all others, must be answered. And how?

Obviously some lines in such a treaty, and also some spaces between the lines, must be understood to carry a caution that the reader must examine the whole context, the general intent, other similar treaties, the history of the negotiations, and general principles of law, and a still more emphatic caution that the reader must bear in mind the purpose of all treaties—the purpose that there shall be peace and not war, contentment and not irritation, equality and not inequality.

Some matters, however, are treated adequately. The "all nations" clause, it seems, is clear in itself; and, further, the lights thrown upon that clause by the context, by the documents referred to in the treaty, and by the general system of law prevailing in the two countries which are parties to it, are lights which are harmonious with one another and also harmonious with the natural verbal significance of the clause itself.

The "all nations" clause is as follows:

> The canal shall be free and open to the vessels of commerce and of war of all nations observing these Rules, on terms of entire equality, so that there shall be no discrimination against any such nation, or its citizens or subjects, in respect of the conditions or charges of traffic, or otherwise. Such conditions and charges of traffic shall be just and equitable.

On the very first reading almost anyone will say that this clause is clear and that there is no verbal ground for supposing the United States to be excluded from the hospitable phrase "all nations observing these rules." Apparently the only reason causing the meaning to be questioned is that in this clause there are at least three features: (1) the guaranty to "all nations" of the right to use the canal, (2) the guaranty to "all nations" of the right to be protected against inequality and injustice, and (3), argumentatively, the exaction from "all nations" of the duty to obtain no unjust discrimination. Probably no one would object to including the United States among the nations profiting by the guaranties of use and of equality; but there are those who believe that the United States is free from the argumentative duty of obtaining no discrimination. This argumentative duty flows so clearly from the holding of rights under the clause, that this duty cannot be avoided without contending that the United States is not included among the nations profiting by the clause. Thus is happens that the peaceful phrase "all nations" becomes a battle ground.

There are at least five reasons—in addition to the words of the clause itself—for believing that the United States is included among "all nations." These five reasons are independent of each other in the sense that any one of them is by itself enough to uphold this construction of the treaty.

First, the preamble says that the treaty is negotiated without impairing the general principle of neutralization established in Article VIII of the Clayton-Bulwer Treaty; and as that article expressly said that any isthmian canal should be "open to the citizens and subjects of the United States and Great Britain on equal terms," it is reasonable to believe that the "all nations" clause of the Hay-Pauncefote Treaty, which is the only clause giving any rights to Great Britain, continues to give to Great Britain, in the absence of clear language to the contrary, a right that the canal shall be "open to the citizens and subjects of the United States and Great Britain on equal terms"—a result which is not achieved unless the "all nations" clause is construed as including the United States. Will anything but extraordinary language cause any one to believe that a right to equal terms with the United States, a right theretofore existing, was in this treaty abdicated by Great Britain?

Secondly, in Article II, which is the only place in which rights are given to the United States specifically and not merely as one of "all nations," the rights are expressly said to be "subject to the provisions of the present Treaty"; and thus it is reasonable to believe that the United States is to be one of the "nations observing these Rules." Does the United States profess not to be subject to "all provisions," and do not the provisions include "these Rules"?

Thirdly, in Article III the United States expressly "adopts, as the basis of neutralization of such ship canal, the following Rules"; and thus again it appears reasonable to believe that this is to be one of the nations which in the very next paragraph are spoken of as "nations observing these Rules," especially as part of this very rule, namely, the part requiring the rates to be "just and equitable," is addressed distinctly and peculiarly to the United States. Does the United States not intend to be one of the "nations observing these Rules" adopted by itself?

Fourthly, the Hay-Pauncefote Treaty says in Article III that "the United States adopts, as the basis of the neutralization of such ship canal, the following Rules, substantially as embodied in the Convention of Constantinople * * * for the free navigation of the Suez

Canal"; and as that convention in its first article says that the canal "shall always be free and open * * * to every vessel of commerce or of war, without distinction of flag," and in its twelfth article emphasizes "the principle of equality as regards the free use of the Canal, a principle which forms one of the bases of the present Treaty," it seems reasonable to believe that in the "all nations" clause, the first rule which the Hay-Pauncefote Treaty lays down in execution of its asserted purpose to adopt "Rules substantially as embodied in the Convention of Constantinople," there should be a liberal meaning assigned to the words "The canal shall be free and open to the vessels of commerce and of war of all nations observing these Rules, on terms of entire equality, so that there shall be no discrimination against any such nation, or its citizens or subjects, in respect of the conditions or charges of traffic," and also to believe that only very clear language could permit the United States to enjoy a privilege of inequality—a privilege conceded to no nation by the Constantinople Convention. Is equality a virtue—or perhaps a policy—peculiar to the Old World and inappropriate to the New?

Fifthly, as in both Great Britain and the United States there is established by judicial decision—and also recognized and applied by well-known statutes—a doctrine requiring all pursuers of a public calling to serve all comers and to serve them without arbitrary discrimination, and as a canal, like a railway, is an instance of a public calling, it may well be contended that any treaty between these two countries is to be construed, if possible, in such a way as to recognize these duties, since the words of any treaty between these two countries are necessarily written in the atmosphere of their several—and in this instance concurrent—systems of local law, and that hence, in the absence of clear language to the contrary, the "all nations" clause, with its provision of "entire equality," is to be understood as including vessels of commerce and of war of the United States among those enjoying such rights, and as recognizing the rights of all vessels from other "nations observing these Rules" to be treated on the same basis as those of the United States. If the canal had been built, as the treaty permitted, not by the government but by individuals or by a corporation, the duty of treating all vessels, whether American or foreign, on the same basis would have been enforced by the United States for and against every nation, including itself; and it seems reasonable to believe that the equal rights and duties of Americans, British, and others were not affected by the adoption of the other alternative which the

treaty permitted—the building of the canal by the government. It should be borne in mind that the later acquirement of sovereign privileges from the Republic of Panama did not affect the rights and duties of the United States as to this matter; for in Article IV of the Hay-Pauncefote Treaty "It is agreed that no change of territorial sovereignty or of the international relations of the country or countries traversed by the afore-mentioned canal shall affect the general principle of neutralization or the obligation of the High Contracting Parties under the present Treaty." The obligation of the United States consequently remains what it was just after the Hay-Pauncefote Treaty. Doubtless there is a right to free transit for vessels engaged in constructing or maintaining or protecting the canal, such a right being covered by the words of Article II which say that the "Government shall have and enjoy all the rights incident to such construction," and perhaps it is fair to say that all public ships of the United States are thus exempted, since all of them when using the canal are in a sense protecting it; but it would be an error to confuse such ships with ships in no way belonging to the government or used by it, and as to these wholly private vessels, though belonging to citizens of the United States, it is reasonable to contend that according to general principles of law, even without a treaty, there is a duty of equality. Let it be remembered that when a government engages in ordinary business, for example in the sale of intoxicating liquor, it is not performing a governmental function, is not exercising any rights of sovereignty, and is subject to the ordinary rules pertaining to such a business. Let it be remembered, too, that the conducting of a canal for general use is not the exercising of a governmental function, but is the pursuit of a business clearly belonging to the class of public callings and charged with certain peculiar duties. Is it conceivable that when the United States, by a treaty obtained when it was not as yet entitled to sovereign powers in Panama, arranged for possibly entering upon a public calling, it is to be understood to have intended to reserve in that treaty, otherwise than through the use of extraordinary language, a right to carry on that business in a discriminatory manner which its own courts and its own Congress, in dealing with similar callings, have pronounced unbusinesslike, impolitic, dishonorable, and illegal?[1]

These, then, are reasons—and doubtless others can be given—

[1]This last line of thought has been presented more elaborately in an article entitled "Exemption from Panama Tolls," AMERICAN JOURNAL OF INTERNATIONAL LAW, Vol. 7, p. 233 (April, 1913).

for believing that the United States is included among "all nations observing these Rules," and that vessels belonging to the United States or to its citizens have the right of use, the right of equality, and the duty of observing the rights of others to similar equality, as prescribed in the "all nations" clause.

Of these five reasons, two appeal to words in the context of the treaty itself to show that the United States is to be one of the "nations observing these Rules"; two appeal to instruments referred to by the treaty; and one appeals to that general law which must have been in the minds of the persons framing and adopting the treaty and which should now be in the minds of the persons reading and enforcing it.

These five reasons may be condensed thus:

(1) It would require extraordinary language to authorize a belief that Great Britain, while still clinging to the neutralization article of the Clayton-Bulwer Treaty, meant to give up the right to use the canal on equal terms with the United States.

(2) As the United States gets no rights except "subject to the provisions" of the treaty, it must be understood to be one of the "nations observing these Rules."

(3) As the United States adopts the rules, it must be understood to be one of the nations observing them.

(4) It would require extraordinary language to show that the parties to the Hay-Pauncefote Treaty, while referring to the Convention of Constantinople, meant to establish a rule of inequality wholly hostile to the words and spirit of that convention.

(5) It would require extraordinary language to indicate an intent to depart from that doctrine of equality which by both English and American law is attached to all public callings.

All these reasons may be reduced to one—that as in these days equality is the only ideal justice, a treaty must be understood to establish equality unless there is emphatic language to the contrary.

Is there emphatic language removing from the United States the normal rule of equality and permitting the United States to make discriminations in behalf of its own citizens? Let the "all nations" clause be read again:

> The canal shall be free and open to the vessels of commerce and of war of all nations observing these Rules, on terms of entire equality, so that there shall be no discrimination against any

such nation, or its citizens or subjects, in respect of the conditions or charges of traffic, or otherwise. Such conditions or charges of traffic shall be just and equitable.

Does it not seem that this clause emphasizes equality rather than inequality? Yes; and it seems also that the United States may well pride itself both upon being the nation adopting these rules and also upon being included among "all nations observing these Rules."

The CHAIRMAN: Gentlemen, the question is open for general discussion.

Mr. JOHN H. LATANÉ. Mr. Chairman and Gentlemen: I wish to take up one or two points which have been brought up by Mr. Nixon, and also some points raised by Mr. Olney.

Mr. Nixon's paper was exceedingly interesting and suggestive. I should like to have an hour in which to discuss it. But there my commendation of the paper ends.

If you will just notice the clause that he laid so much stress upon (contained in the first draft of the Hay-Pauncefote Treaty)—"The canal shall be free and open to the vessels of commerce and war of all nations *which shall agree* to observe these rules,"—you will remember that he contends that the words "shall agree" show clearly that the United States was not included in the term "all nations." Now I will ask Mr. Nixon to apply exactly the same line of argument to England, and we have a complete *reductio ad absurdum*. If the use of the future tense excludes one of the parties to the treaty, it must necessarily exclude the other. Does Mr. Nixon mean to tell us that England is not bound to observe the rules of this treaty because she was one of the signers of this treaty and that the treaty was intended to bind only those Powers which should agree to it at some future time? He also appears to adopt as the fundamental basis of his paper the assumption that England's rights in regard to the canal are established and enlarged by this treaty; whereas, as a matter of fact, England's rights were restricted by this treaty, and Professor Wambaugh has shown very clearly that we can not, therefore, think for one moment that England gave up any rights under the earlier treaty unless that fact was very clearly stated in the Hay-Pauncefote Treaty.

In Mr. Olney's paper there were also some rather strange logical fallacies. In fact, his paper sounded like the argument of counsel in

a case. He used the term "United States" in three or four different senses. The paper was logical in form, but sometimes in referring to the "United States" he was referring to the Government of the United States, and sometimes in referring to the "United States" he was referring to the ships owned by American citizens. His whole argument was thus invalidated.

I object to his use of the term "customers" as applied to the nations using the canal. But if we assume that the United States has set up a baker's shop or some other commercial enterprise down there on the isthmus, and that the nations of the world are to be regarded as "customers," we may ask the question, "Are not the citizens of the United States also Uncle Sam's customers in regard to the canal?"

The whole discussion of this question as far as it relates to the treaties reminds me very much of a story told of old Governor Letcher, of Virginia,—"Honest John," as he was affectionately called. After he retired to Lexington to resume the practice of law, a client came into his office one day and said, "Governor, I signed a contract here some months ago and I want to see if you can help me to get out of it." The Governor read the contract very carefully and then inquired, "Who drew this contract?" The client replied, "I drew it myself." The Governor then said, "I thought so! If you had gotten a lawyer to draw that contract, he would have left a loophole for you, but since you were fool enough to draw it yourself, you have stated your obligations under the contract so clearly that there is nothing I can do for you."

I am afraid that a good many treaties are made in the way that lawyers draw contracts. I do not believe it would be possible to draft a treaty so that Mr. Nixon and Mr. Olney, by the combined ingenuity which they have shown in their papers, would not be able to dig a Panama Canal through its terms if they wanted to do so, by the method of argument they have employed today.

It seems to me that we are bound to interpret this treaty in the light of the Clayton-Bulwer Treaty, to which reference is made in the preamble, and also to some extent in the light of the Treaty of Constantinople, which is quoted in the text. I will admit that the expression "all nations" and the clause containing it are not very clear; but I believe very firmly, from a study of all the correspondence in the case and of the situation of the two Powers at the time that the Hay-Pauncefote Treaty was being drawn up, that both England and the United States at that time believed that the term "all nations" did

apply, and that the other provisions there, except those specially excepted, likewise applied to the United States.

If we are to accept the interpretation that some people put upon this treaty, what becomes of Mr. Roosevelt's main ground of justification for the seizure of Panama? He claimed to be acting as the agent of collective civilization, exercising an international right of eminent domain. After that, having gotten the territory, we turn around and say, "The canal is our property, it is built with our money, and therefore our ships should go through free." Of course there is a very apparent fallacy here. "The canal is our property," meaning the property of the United States. "It was built with our money," meaning the money of the people of the United States," and therefore our ships should go through free,"—"Our ships"! What do we mean by "our ships"? "Our ships" are the ships of a small group of ship-owners, and they are not the ships of the people of the United States. That fallacy is very plausible, but it needs only to be pointed out to be apparent as a fallacy.

Professor ALBERT BUSHNELL HART (of Harvard University): Mr. Chairman, it is a very great pleasure to hear our international lawyers so cordially disagree, especially so to the observer and student of diplomatic history, because he feels sure that so long as he is active, there will still be new material for him to work upon and contrary views for him to set forth and to reconcile if he can.

As a student and historian of diplomatic affairs, I beg to suggest three different historical elements in this problem. Without taking ground upon the immediate issue of this debate, I wish to point out three things which must affect any judgment of any question relating to this treaty and to this controversy.

The first of these is that the Hay-Pauncefote Treaty is a residuum. It is not a creation of the diplomatists of two nations facing a new crisis and coming together to find a way out; but it is a deliberate alteration of a previous status, as is evident from the extracts so cogently set forth by Admiral Stockton and Mr. Nixon. It is clear that when this question first arose as a national question, which was about 1835, everybody in the United States took the ground that any canal that was constructed must be an international affair, in the sense that its use was to be common and equal to all nations. And why? Because the United States was one of the weak Powers. The United States was one of the Powers that might be shut out by any other

principle, and until very recently nobody ever suggested that there was any other principle fairly applicable to this difficulty so far as the United States was concerned.

The Clayton-Bulwer Treaty was not simply an international agreement with reference to the construction of a water highway at Nicaragua or Panama or anywhere else. It is much more than that. It was a division of a maritime empire, and it was so intended. Great Britain, then the greatest maritime Power in the world, with its great navy and its great commercial marine, and the United States, then the second commercial Power in its foreign shipping in the world, were both intimately interested in America, Great Britain occupying not simply a coign of vantage in its position in Canada, but, as a great commercial nation with its interests in the West Indian colonies, a greater interest than any other Power in view of the conditions of commerce, and holding a position of greater advantage toward that canal. But the Clayton-Bulwer Treaty was a triumph for the United States, in so far as it set forth the United States as an equal party to any canal and to any canal legislation that might ever be made. It was an acknowledgment, and for the first time, that in all maritime affairs the United States of America had an equal interest.

Some allusion has been made to the Monroe Doctrine. The Monroe Doctrine certainly cannot override a diplomatic agreement made and ratified in due form by both countries and in operation for more than sixty years, namely, the Clayton-Bulwer Treaty. The Clayton-Bulwer Treaty must have been in accordance with the Monroe Doctrine, because it was made by those persons and those only who had any authority in the United States to give an explanation to the Monroe Doctrine.

The second point is, that the conditions of the canal being so far changed that it has actually been constructed by one of the great Powers of the world, it makes a tremendous difference with all its relations. The idea of a canal built by a company, in which anybody may take stock, under the auspices of a great number of Powers, under the control of two of the principal Powers, who take upon themselves that great function, has gone by, and by the Hay-Pauncefote Treaty the United States has been acknowledged as the one Power that shall build the canal. But that is not all. It has not only taken that responsibility, it has not only assumed the moral risks, if you like, of making itself master of the canal strip, but it has put in hundreds

of millions of dollars of its own money; and, although Professor Johnson is to speak to-night, and whatever he says about canal tolls and the future we must accept, because no man has given so much study to that phase of it as he, yet it seems to me highly unlikely that the tolls will ever be much more than the expense of keeping the canal open, and you and I and our children are going to pay the tax for keeping that canal up. After all, something is due and certain consideration is due to the fact that the United States is the proprietor, and there is one fact connected with that proprietorship which we absolutely cannot get away from, and that is that the canal will never be used as a military engine in any way against the United States.

You may make treaties, you may legislate until "the cows come home," but you cannot make any treaty that can bind the great nations to permit other nations to use territory under its control to its hurt. Something will happen if we go into war and the ships of other nations, our enemies, endeavor to pass through the canal. Somebody will forget to close a bilge cock; somebody will forget to close a gate; something will somehow drift across the channel, and it will be a week before that ship can be gotten through. We all know there is no equality with us in that respect, and never will be. There is no treaty that can hold any country in the world to the use of the Panama Canal in a military sense contrary to the United States.

The third point is with reference to a thing which is hardly alluded to in this discussion, and that is the Constantinople Convention. What was that convention? It was eighteen years after that convention was made before it was ratified and put in force. And why? It was because the Constantinople Convention did not exactly accord with the status of things in Egypt.

Ladies and gentlemen, we all know that the great and controlling reason why Great Britain gave up her half share in the future canal was that she had the whole share in the Suez Canal, and it was contrary to reason that any great nation should actually be the possessor and controller of one of the two great waterways and should have a half interest in the other. Great Britain had to yield the point of any kind of control, had to yield the point of control to the United States, because she was exercising that control in another part of the globe.

I went through this Suez Canal a few years ago and it did not look English. It did not wear eyeglasses. It looked very Egyptian. The reluctant camels snorted their defiance of the competition which was

depriving them of their daily dates. Yet it was English, and it is substantially under the control of the British Government.

If you will read the whole of the Constantinople Convention, you will find other things than this clause to which I have referred; for instance, a clause to the effect that Great Britain shall have a right to intervene, if necessary, for the protection of the canal and the protection of its connection with its Red Sea possessions.

Again, all the world knows that the Suez Canal can never be used in a military way against the interests of England, and never will be. Sooner or later something will happen to a canal which is involved in anything of that sort. Suppose a war breaks out next week between Germany and England, how many German vessels will ever be allowed to go through the Suez Canal to attack the British colonies and commerce of Asia?

I think one of the best things would be a study of the Constantinople Convention with respect to the relation of England to the Suez Canal, and of the attitude and administration of that canal with regard to tolls. If Great Britain in the Suez Canal does treat the ships of all nations with impartial equality, there is an added reason for supposing that the British who made the Hay-Pauncefote Treaty expect the same principle to be applied here. If it can be shown that Great Britain practices discrimination in Suez, then that nation cannot come here with clean hands and claim the kind of preference or indemnity which, under its own rules of the Constantinople Convention, it does not accord elsewhere. But that is a matter of fact, which I leave to be settled by this honorable Society.

Mr. Lewis Nixon. Mr. Chairman, I do not think there is much more to be said. The question is on the phrase "all nations which shall agree to observe these rules"; whether the mere fact that the nation which makes them might be considered as bound to observe them, puts that nation in the place of those who shall agree to observe them; and whether the mere fact of agreeing makes them a party to the contract. That has already been clearly touched upon in the correspondence between Lord Lansdowne and the representative of Great Britain in this country, where Lord Lansdowne said that the phrase "The nations which shall agree to observe these rules" was for the purpose of showing that Great Britain was not to be caught in a disadvantageous position in comparison with other nations; and those

other nations, it is very plain to see, were not the United States. I was very glad to hear Professor Hart. Speaking about opening the canal, he says it is to be free and open. On the question of "free and open," the most important thing said here today was the outlining of the differences which existed at the time the canal was opened and conditions existing now. We were told of this great expanse of territory to the north of us, of the stations which Great Britain has dotted around both the canal and all of her territory elsewhere, and we were told she had about seven millions of people at that time, and has now reached the great sum of ten millions; that we had twenty-three millions at that time, and have now reached one hundred millions. Our interests are there, and we own this territory just as much as if it were territory around the Mississippi Valley.

The fact too, which we were told, that Great Britain's control of the commerce of the world is overwhelming is very good evidence that she will be the great beneficiary of this canal. We were also told that we are not going to raise anywhere near the amount of money necessary for expense and upkeep of this canal and interest on its bonds, so clearly in opposition to the policy in connection with the Suez Canal where they charge up to 25 per cent, and when it gets to 25 per cent, they generally cut down the rate. Lord Lansdowne said that what he considers just and equitable rates shall be rates which will pay for cost of operation and the mere cost of interest. If he would apply that to the Suez Canal, which England so much controls through its control of a great block of stock, he would find the Suez Canal rates are the ones that are unjust and inequitable and not ours, because, whether we remit the tolls on our own vessels or not, whether we charge tolls on our foreign trade and the trade of the rest of the world, it is very probable we shall not raise much more than nine million dollars. Taking out of this the cost of operation at $4,000,000, we shall have only that amount to pay interest on our bonds. So this inequitable condition, wherein we pay this great expense, exists as a subsidy to the foreign ships of the world and not to the ships of the United States.

There is some little criticism about the taking of the Panama Canal. That is a condition that was thrust upon us, as we all know. We were obligated to keep the isthmus open and to protect the neutrality and sovereignty of the isthmus on the part of Colombia. We have protected it, and it has changed the form of government. We have

a treaty with that government, which fairly covers the point. I claim that the "terms of equality" that are so much talked about here this afternoon, do apply within the field where they can apply, and that field is the field of neutral operation.

There is a very important thing that seems to be left out by so many in reading this rule, which I claim was entirely consistent with the policy of the operation of the canal as affecting belligerents, and that is that they forget the word "otherwise." They come down simply and solely to charges on traffic and forget the "otherwise" conditions which are just as binding as anything else. I have never seen a single meeting of the minds on the one great statement in connection with this canal—that is to say, that Article III covers the rules adopted for the purpose of neutralization. You cannot prove "neutralization" means equal treatment, because it does not. The mere fact is England put that clause in the first article of the Clayton-Bulwer Treaty and then in Article VIII it was stated if she extended these conditions and brought about a joint protection, which she never did, that she might then have equality of treatment. Those clauses do not follow and are not observed in this particular treaty which we have before us. I only wish that people who meet and bring up this question would read more carefully Rule I of Article III. It is for a definite purpose and clearly recognized by international law, and clearly recognized by every word in this treaty.

Rev. ROSWELL RANDALL HOES (Chaplain, U. S. N.): Mr. Chairman, I wish to make an inquiry simply as a matter of fact, not of opinion.

I have been informed that there is an error in that first chart, and if an error, no doubt inadvertently made. I have been informed the first treaty was passed by our Senate and rejected by England instead of being rejected by our Senate. What is the fact?

Chairman SCOTT. I will ask Mr. Nixon to give you response.

Mr. NIXON [pointing to chart printed on page 103]. That treaty was changed. That treaty as it stands there was rejected. That was the treaty drawn by Lord Pauncefote. It was submitted to the Senate and the Senate changed it, and then the changes were not satisfactory to Great Britain. That was the original treaty as submitted to the Senate. The Senate changed it so much that it could not be adopted by Great Britain, because we knocked out all contract rights. I believe I am right on that.

MR. CRAMMOND KENNEDY (of the District of Columbia). Mr. Chairman, that is the most astounding statement to be brought into a hall where some knowledge of diplomacy and of international law is supposed to exist!

Some time ago when Admiral Mahan wrote his article in favor of fortifying the canal, he made the statement that the Senate had rejected the treaty, the first Hay-Pauncefote Treaty, which had a distinct prohibition of fortifying the canal. Having a great respect for the admiral's ability, I undertook to show in the *New York Evening Post,* that instead of that being the fact, the very contrary was true—that the United States Senate had ratified or rather advised and consented to the ratification of the first Hay-Pauncefote Treaty containing that express prohibition of fortifications. The Admiral wrote to the *New York Evening Post* confessing that his trust in the authenticity of certain information which had been furnished to him—perhaps it was some of Mr. Nixon's literature—had been betrayed and that what I said was true; that the first Hay-Pauncefote Treaty containing that prohibition had been ratified by the Senate.

The Senate adopted a single amendment which the late Senator Morgan had opposed and on which he had written a minority report. That amendment provided in a few words that in case the defense of the United States by its own forces required it, the rules for neutralization, which have been dwelt upon so much, should give way; that is, nothing in the treaty was to stand in the way of the national safety of the United States, as it might be regarded by the government.

When that amendment was brought to the attention of the British Government, it rejected the treaty in toto, because, as Senator Morgan had argued, it might nullify the general principle of neutralization. It simply meant that all the covenants for neutralization and freedom of passage and equality of terms should go for nothing if, in the judgment of the United States, a crisis had arisen that required the practical abrogation of the treaty.

Instead of the earlier Hay-Pauncefote Treaty being, as Mr. Nixon has represented, the pro-British treaty and the later treaty being the pro-American treaty, almost the reverse of that is true. The first treaty was both the British and the American treaty, agreed upon between them both, with the single exception of the particular amendment I have mentioned. When that treaty was sent to Congress, we were told by the President of the United States—and remember that it had a provision in it expressly prohibiting fortifications, that it gave

us everything that we had ever claimed or that we really wanted. Yet here today we are told in this presence that the Senate had rejected that treaty, whereas the Senate advised and consented to its ratification, and the only thing that prevented its proclamation by the two governments was the provision for nullification, under certain possible conditions, of neutralization and equal terms.

Admiral Mahan was man enough to acknowledge that he had been misled as to a fundamental fact, and he made his apology accordingly.

Although I served under General Grant in the Wilderness when I was scarcely of age and have always loved my adopted country with my whole soul, I still have enough of Scottish blood—or British blood if you like to change the adjective—running in my veins to be aggrieved when any false charge is made against the mother country. It does not pay. We are of the same race, and we really, deep down, love each other; and all these foolish and ignorant words, sometimes venomous in their malice, that are uttered with a tendency to alienate the two peoples, are to be deprecated. I want to say, as earnestly and forcibly as I can, that never in modern times, nor perhaps at all in history were more sincere efforts made to bring about a friendly understanding and a fair basis of agreement between two governments than were made not only in the negotiations of the Clayton-Bulwer Treaty, but in the subsequent attempts to compose the differences that arose in regard to its true interpretation.

I want to read just a little bit of history. I hold in my hand the unanimous report of the Foreign Affairs Committee of the Senate,[1] except for that one dissent of Senator Morgan, and that was in the interest of the treaty, because he wanted it intact. In the course of that report, which was made by Senator Cushman K. Davis, who was well able to expound the law of nations, he refers to the conduct of Great Britain in regard to what happened after the ratification of the Clayton-Bulwer Treaty, and the complaints that were made from some quarters of the course that she pursued; and here is how these differences were composed. I read from page 6 of Senator Davis' report:

> Conceding that all our contentions were just, as they manifestly were, as to the conduct of Great Britian, in holding to the mouths of the San Juan River after the treaty was ratified, and in raising a logging camp to the dignity of a Crown colony at Belize, and in her aggressions at Ruatan and the Bay Islands, these aggressions

[1]Senate Document, No. 268, Fifty-sixth Congress, 1st Session, April 5, 1900.

were intended by both governments to be corrected through the treaties made by Sir William Gore Ouseley with these three republics.

That is, the Government of Great Britain constituted a special mission to the Central American countries—Guatemala and Honduras and Nicaragua—for the express purpose of so changing and modifying her sovereign rights in these parts of the world, including her relations with the Mosquito Indians, as to bring those relations by treaty into accordance with the ideas and demands of the United States. Now, see how that was done!

Speaking of these Central American treaties Great Britain made between 1858 and 1860, Mr. Davis said:

> All these treaties were most carefully examined by the President of the United States, and were laid before Congress in his annual message in December, 1860.[2]
>
> Congress expressed no dissent to them, or to the President's declaration that "The dangerous questions arising from the Clayton and Bulwer treaty have been amicably settled."

Mr. Chairman, it is an evil day when the official words of the President of the United States, addressed to our supreme legislature, can be whistled down the wind by assertions showing just as much malice, it seems to me, as ignorance.

"Congress expressed no dissent to them nor to the President's declaration that 'The dangerous questions arising from the Clayton and Bulwer treaty have been amicably settled.' "

Speaking for the committee, Mr. Davis said:

"We cannot now assert to the contrary—" Remember, this is the unanimous report which was made by the committee, with the qualification which I have named, and which was adopted by the Senate.

The Senate committee says:

> We cannot now assert to the contrary, and, for the purpose of abrogating that treaty, we cannot insist that those questions are not settled.
>
> But the President went still more fully and carefully into the matter and made the following conclusive statement, in which he points out the "discordant constructions" of the Clayton-Bulwer Treaty as the matter that is settled. He says—

[2]Richardson's *Messages and Papers of the Presidents*, Vol. V, p. 639.

That is, the President of the United States in an official communication to Congress, says:

> The discordant constructions of the Clayton and Bulwer treaty between the two governments, which at different periods of the discussion bore a threatening aspect, have resulted in a final settlement entirely satisfactory to this Government.

Mr. Davis then goes on to say:

> As no Congress from that day to this has disputed the validity and finality of this settlement, it can scarcely be justifiable now to set up those same "discordant constructions," or the alleged want of good faith in the British Government in executing the treaty, as a reason for declaring that the treaty is in fact abrogated."

My friend [Mr. Nixon] was dealing with the past, with what for a time had excited the public mind in the United States; but Sir William Ouseley's special mission had been sent to Central America and Great Britain had removed the causes of complaint of the United States, as announced to Congress by the President.

Mr. Davis says further:

> The President then proceeds to restate the actual controversies and the manner of their settlement, as follows—

This is a careful statement by the President of the manner in which the British Government made such changes as conformed the situation to the wishes of this government, and, he might have added, of the people.

This is the President's statement, as quoted by Mr. Davis:

> In my last annual message I informed Congress that the British Government had not then "completed treaty arrangements with the Republics of Honduras and Nicaragua in pursuance of the understanding between the two governments. It is, nevertheless, confidently expected that this good work will ere long be accomplished. This confident expectation has since been fulfilled. Her Britannic Majesty concluded a treaty with Honduras on the 20th November, 1859, and with Nicaragua on the 28th August, 1860, relinquishing the Mosquito protectorate. Besides, by the former the Bay Islands were recognized as a part of the Republic of Honduras. It may be observed that the stipulations of these treaties conform in every important particular to the amendments adopted

> by the Senate of the United States to the treaty concluded at London, on the 17th October, 1856, between the two Governments [The Dallas-Clarendon Treaty]. It will be recollected that this treaty was rejected by the British Government because of its objections to the just and important amendment of the Senate to the article relating to Ruatan and other islands in the Bay of Honduras.

Mr. Davis then says:

> It is not possible to ignore a fact or situation so fully and impressively declared by the President in a message to Congress, and acquiesced in by the failure of Congress to signify any dissatisfaction toward the final settlement so declared, as to the only points of contention that had then arisen under the Clayton-Bulwer Treaty.

When the Senate came to ratify the Hay-Pauncefote Treaty now in force, it was done on the assumption and express declaration that nothing had happened, from 1850 to the date of the adoption of the new treaty, to impeach the good faith of Great Britain, or to impair the efficacy of the old Clayton-Bulwer Treaty.

I am in no physical condition to make a long speech, but Dr. Scott has inquired whether I do not want to say a word or two about the matter of neutralization and neutrality.

I do not know in what college my friend [Mr. Nixon] is professor of international law, but it seemed to me that all through his speech he was confusing two things that are very different, namely neutrality and neutralization. I am sorry to say that the Panama Canal cannot be said, in the strict and practical sense of the word "neutralization," to be neutralized. Neutralization cannot be maintained by one nation alone. The publicists all agree that an essential part of the definition of neutralization is that it shall be guaranteed by a sufficient combination of the great Powers to insure its maintenance.

Perhaps I may be pardoned for saying that it seems to me one of the great misfortunes of our times that the Panama Canal has not been, and is not now, neutralized, in that true and permanent sense. Suppose that, instead of the canal having been dug, God had made it. Suppose that in the dawn of creation instead of there having been the Isthmus of Panama, there had been the Straits of Panama. What nation, knowing the meaning of the "Freedom of the Seas," would have claimed the right to lay a finger on that connection between the

two great oceans, in any way destroying or impairing the equal use of it on the part of all the commercial nations of the world?

The reason why the United States is going wrong in this matter is, as it seems to me, that she has forgotten what she declared so persistently in the earlier stages of this great project—that whoever builds the canal, whoever pierces the great barrier of the Isthmus and weds the two seas, must do it for all mankind; and if the thing has that broad human character and world-wide interest, is it not better for all the maritime nations to recognize the fact and make such agreements among themselves as will preclude, as has been done for forty years in the use of the Suez Canal, any of these bickerings and heart burnings that are so to be regretted between countries that ought to be the best of friends?

Mr. LEWIS NIXON. Mr. Chairman, I make it a point to never take offense at what is said before my face, but had I not remained over, contrary to my original plans, my statements would have been put before you by the gentleman and I would have stood before you as one who had made a statement which was not exactly correct. That in itself by Mr. Kennedy was most outrageous because it was supported by the facts submitted by the State Department, of record in Congress, and known to everyone that discussed the treaties here before us.

The treaty of February 5, 1900, was rejected by the Senate. Here (indicating) is the official document by the United States Government, submitted by Mr. Root, prepared by Mr. Hay, and it says:

> The Senate's amendments to the former treaty required, first, that there should be in plain and explicit terms an express abrogation of the Clayton-Bulwer Treaty; second, that the rules of neutrality adopted should not deprive the United States of the right to defend itself and to maintain public order.
>
> And, third, that other powers should not in any manner be made parties to the treaty by being invited to adhere to it.

Mr. KENNEDY. That second one is the one that was put in by way of amendment against Senator Morgan's objection.

Mr. NIXON. I know it was put in, and they rejected that treaty, and made a new one, and I have here a copy of it as it was sent back

to Lord Pauncefote. In other words, it was never confirmed, which means it was rejected, and when the treaty came back to them Great Britain would not accept the modified form, and the whole thing was thrown into the process of discussion, and we finally came to the treaty of 1901.

Mr. KENNEDY. I want to disavow any intention to be discourteous and to say that I did not mean and do not now mean to impugn the gentleman's honest and honorable intentions; but I do say that the treaty which Mr. Nixon has there on the placard as having been "Rejected by the Senate," was ratified by the Senate, and that the only reason that it was finally rejected—because you understand when the rejection of Great Britain came back to the Senate, the Senate had to act on that—was on account of that second amendment to which you have referred.

Mr. NIXON. It was ratified by the Senate, with certain amendments, and I have not got the amendments in there, so that is the treaty. I do not want to make any error when I present a statement of absolute facts. That is the draft of the first treaty submitted.

Mr. KENNEDY. The thing you emphasize as being pro-British and that you have in there in red letters was the thing that the Senate ratified.

Mr. NIXON. I do not know whether they did or not. That original draft was not ratified.

Mr. KENNEDY. I beg your pardon!

Mr. NIXON. Some parts of it were kept in.

Mr. KENNEDY. The treaty which you have presented in that shape, the two being distinguished from each other, is a treaty that the Senate did ratify, but which, on account of a subsequent amendment against Senator Morgan's advice, was rejected by England and then—

Mr. NIXON. (Interrupting) I admit that.

Mr. KENNEDY. And then, when England's official rejection came back, the Senate could not ratify it again because it already had ratified it with that amendment, and it had been rejected by England. In other words, if Great Britain had not rejected the treaty just as it is there, with your red letters, it would have been the law today.

Mr. NIXON. The only point is that here are two state documents. I took the first draft submitted by President McKinley to the Senate. I took that from the treaty, and the treaty that was sent back was not the same. I have Senator Foraker's statement that it was ratified with certain amendments. It may be I have some wording of the ratified treaty in there.

Mr. KENNEDY. You have it all.

Mr. ALBERT BUSHNELL HART. Mr. Chairman, may I ask Mr. Kennedy a question? Suppose you wrote a letter to a man and said, "I will give you five dollars per ton for a carload of coal." Suppose he wrote back and said, "I accept your offer provided you make the price six dollars per ton." Is your contract ratified by that man?

Mr. KENNEDY. You do not need to ask that question of Mr. Kennedy or anybody else.

My complaint is that the provisions which Mr. Nixon has stated were pro-British and anti-American in his discussion of the treaty are the very things that the United States Senate accepted without change. The other amendment had nothing to do with the matter except, as Senator Morgan said, to nullify the whole business if the specified contingency arose.

Mr. NIXON. If I had not been here, it would have been assumed I made a wrong statement, which I have not done. You said it was a most outrageous presentation.

Mr. KENNEDY. I say it is a most outrageous thing to bring before a body of people that have debated this question, such a placard of the treaty, entitled, "Rejected by the Senate," and say these articles were pro-British and anti-American, and these other ones were the oppo-

site, when the United States Senate adopted and ratified every one of the articles which you have shown to this audience under the title "Rejected by the Senate."

Mr. NIXON. That (indicating) was in the ratified convention and that (indicating) is the treaty that was rejected,—in other words, you say "changed" and I am perfectly willing to adopt your theory; but there is nothing outrageous in my putting it here, because I put it here for the purpose of exhibiting to the members the meaning of the words "all nations," and that is all my purpose, to show that it did not include the United States.

Mr. KENNEDY. As soon as Great Britain was notified of that one amendment, the treaty which she would have ratified, *and which the Senate had already ratified* with that amendment, was returned to the Senate because Great Britain would not agree to it so amended.

Mr. WILLIAM MILLER COLLIER. Mr. Chairman, I want to say one word, with reference to the closing remark of Mr. Kennedy in his support of a measure of the policy of neutralization of the canal.

He says if God had made a strait where He made an isthmus, no nation that believes in the freedom of the sea would have permitted itself to have been excluded from the use of that canal! But God did not make a strait; He made an isthmus, and the barrier that He erected there was a bulwark for the defense of the western coast of the United States from any foe coming from the Atlantic, and a bulwark for the defense of the Atlantic coast against any foe coming from the Pacific. If a man can tear down that barrier and open that passageway, he certainly has the right to use that canal in such a way that it shall not be made a means of easier access to his coasts by his enemies.

The CHAIRMAN. Gentlemen, if there is no further discussion, I shall declare the discussion closed and pass to the next subject.

I am very happy to announce that our next speaker is Mr. Horace G. Macfarland, of the Bar of the District of Columbia, who will present his contribution upon the question, "Would a subsidy to the amount of the tolls granted to American ships passing through the canal be a discrimination prohibited by the treaty?"

I take pleasure in presenting Mr. Macfarland.